UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
BRADLEY JAY SCRIBNER	§	CASE NO. 401-44799-BJH-13
	§	
Debtor	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the Court is the Application for Approval of Chapter 13 Attorney Fees (the "Fee Application") filed by counsel for Bradley Jay Scribner ("Debtor" or "Scribner") on January 22, 2002. By letter dated March 25, 2002, the Court expressed certain concerns regarding the Fee Application (the "March 25 Letter") and asked counsel to set the Fee Application for hearing. At the hearing held on June 3, 2002, counsel for the Debtor requested the opportunity to file a letter brief addressing certain of the Court's concerns. That letter brief was filed on June 17, 2002. After considering the pleadings and the arguments of counsel (both at the hearing and in the letter brief), the Court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052 with respect to the Fee Application.

FINDINGS OF FACT[1]

1. This Chapter 13 case (the "Case") was filed on July 2, 2001 (the "Petition Date").

2. The Debtor first met with his counsel on November 30, 2000.

3. Between November 30, 2000 and December 8, 2000, counsel for the Debtor incurred fees of $2,862.50.

4. On March 28, 2001, counsel for the Debtor incurred an additional fee of $105.00.

5. What Debtor claims as his business homestead was apparently posted for a July 3, 2001

[1]No evidence was offered in support of the Fee Application. Certain of the "facts" set forth herein assume that the information from the Fee Application is correct.

foreclosure. Thus, beginning on June 22, 2001, counsel for the Debtor began meeting with the Debtor about the possibility of an imminent bankruptcy filing – *i.e.*, a filing to stop the pending foreclosure. Between June 22, 2001 and June 29, 2001, counsel for the Debtor incurred additional fees of $638.00.

6. The initial draft of the "emergency" Chapter 13 petition was not prepared until the Petition Date. In total, counsel for the Debtor incurred fees of $490.50 on the Petition Date.

7. The Fee Application seeks an award of fees (as an administrative expense of the bankruptcy estate) dating back to the initial meeting with the Debtor on November 30, 2000 (some 6 months before the Petition Date) through January 18, 2002. In total, counsel for the Debtors incurred fees during this time period of $13,092.00. After a voluntary fee reduction, counsel for the Debtor seeks an allowance of fees during this time period (November 30, 2000 – January 18, 2002) of $10,000.00. In addition, counsel for the Debtor seeks an allowance of expenses of $416.48.

8. To date, the Debtor's plan has not been confirmed. The Court assumes that additional fees and expenses have been incurred since January 18, 2002 for which counsel for the Debtor will seek allowance.

9. In the March 25 Letter, the Court expressed four areas of concern based upon its review of the Fee Application. First, that counsel for the Debtor appeared to be a several thousand dollar general unsecured creditor of the Debtor (for its prepetition services). In turn, that raised two sub-issues: (i) does counsel for a Chapter 13 debtor have to be "disinterested" – *i.e.*, not a creditor – to be employed and (ii) even if there is no disinterestedness requirement for counsel to a chapter 13 debtor, can these prepetition fees be converted from a general unsecured claim into an expense of administration through their inclusion in a fee application and the argument that they were incurred "in connection with" the Case? Second, what was

the "emergency" for the filing since counsel had been working with the Debtor for months? Third, what was the need for extensive inter-office conferences among counsel's various attorneys and paralegals? Finally, why did so many professionals review claims and form documents in the Case?

10. As appropriate, a finding of fact may be considered a conclusion of law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the Fee Application in accordance with 28 U.S.C. §§ 1334 and 157. The determination of fees is a core proceeding in accordance with 28 U.S.C. § 157. These Findings of Fact and Conclusions of Law are being entered in accordance with Bankruptcy Rules 7052 and 9014.

2. At the outset, the Court notes that the burden or proof is on the party seeking allowance of its claim as an administrative expense to show that its claim falls within the purview of section 503(b) of the Bankruptcy Code. *See, e.g., Toma Steel Supply, Inc. v. Transamerican Natural Gas Corp. (In re Transamerican Natural Gas Corp.)*, 978 F.2d 1409 (5th Cir. 1992) (construing section 503(b)(1)); *In re SGS Studio, Inc.*, 256 B.R. 580 (Bankr. N.D.Tex. 2000) (same); *In re Canton Jubilee, Inc.*, 253 B.R. 770 (Bankr. E.D.Tex 2000) (construing subsections (1), (3) and (4) of section 503); *In re Buttes Gas & Oil Co.*, 112 B.R. 191 (Bankr. S.D. Tx 1989) (construing subsections (4) and (5) of section 503(b)). Similarly, the burden to show entitlement to fees under section 330 of the Bankruptcy Code rests with the fee applicant. *See In re Prudhomme*, 43 F.3d 1000 (5th Cir. 1995); *In re Consolidated Bancshares, Inc.*, 785 F.2d 1249 (5th Cir. 1986).

3. As counsel for the Debtor and the Court both discovered, there is no reported decision on the question of whether the disinterestedness requirement set forth in section 327(a) of the Bankruptcy Code applies to counsel for a Chapter 13 debtor. Moreover, no treatise on

bankruptcy law addresses this question. While counsel for the Debtor makes persuasive arguments in his letter brief for the proposition that the disinterestedness requirement does not apply to counsel for a debtor in a Chapter 13 case, the Court believes persuasive arguments can be made to the contrary. However, because the Court believes that the application of the disinterestedness requirement in Chapter 13 cases is quite burdensome to Chapter 13 debtors and their counsel, and because the Court has other means to deal with its concern over the fees at issue here, the Court declines to address this difficult issue here. Rather, the Court concludes, for the reasons set forth below, that the fees incurred several months prior to the Petition Date, while perhaps incurred "in contemplation of" a possible bankruptcy case, were not incurred "in connection with" the present Case and thus are not allowable as an administrative expense in the Case. Like other parties who continued to deal with the Debtor while he had financial difficulties, counsel for the Debtor is simply another unsecured creditor unless a retainer is paid to assure payment of those fees.

4. The starting point in the Court's analysis is section 1326(b)(1) of the Bankruptcy Code, which provides for the payment of unpaid section 507(a)(1) claims as part of a Chapter 13 plan. In turn, section 507(a)(1) grants first priority to administrative expenses allowed under section 503(b). Section 503(b)(2) provides that compensation and reimbursement of expenses awarded under section 330(a) are allowed administrative expenses. Section 330(a)(4)(B) provides that a court may allow reasonable compensation to counsel for the debtor in a Chapter 13 case for representing the interests of the debtor "in connection with the case."

5. Thus, as relevant here, the Court must first address what the Bankruptcy Code means when it requires that to be allowable, the fees must be incurred "in connection with the case." Specifically, can prepetition fees incurred by counsel for a Chapter 13 debtor be awarded

under section 330(a)(4)(B) or does the reference to the "case" in section 330(a)(4)(B) require that an actual case be pending for fees to be allowable?

6. To answer this question, the Court must determine what Congress meant when it used the phrase "in connection with the case" in section 330(a)(4)(B). The starting point in statutory interpretation is the language of the statute itself. *United States v. Ron Pair Enter.*, 489 U.S. 235, 242 (1989). Several different sections of the Bankruptcy Code are relevant to this analysis. For example, section 329 of the Bankruptcy Code requires counsel for a debtor to report to the court compensation paid or agreed to be paid for services rendered "in contemplation of or in connection with" the case, "if such payment or agreement was made after one year before the date of the filing of the petition." 11 U.S.C. § 329(a). Of note, while the phrase "in connection with" the case appears in section 329, so does the phrase "in contemplation of" the case. However, section 330(a)(4)(B) only uses the phrase "in connection with" the case. Thus, read literally, Congress intended something different when it used the words "in contemplation of" a case than what it meant by the phrase "in connection with" a case.

7. Unlike counsel for a Chapter 13 debtor (who need not be employed by court order once the case is commenced), counsel for a trustee in a Chapter 7 or 11 case, or for a debtor-in-possession in a Chapter 11 case, must be employed by court order in accordance with section 327(a) of the Bankruptcy Code and is compensated in accordance with section 330(a)(1) of the Code. Section 327(a) requires that counsel be disinterested – *i.e.*, not a creditor of the debtor when the case is filed – and, since counsel is representing an entity created by the Bankruptcy Code itself – *i.e.*, a trustee or debtor-in-possession – fees awarded to such counsel can only be for services rendered after the filing of the case.

8. Section 330(a)(3) provides a non-exclusive list of factors relevant to a court's determination

of the amount of reasonable compensation to be awarded to counsel. Section 330(a)(3) applies to counsel for a Chapter 13 debtor, counsel for a trustee in a Chapter 7 or 11 case, and counsel for a debtor-in-possession in a Chapter 11 case. Section 330(a)(4)(A) requires the disallowance of fees for unnecessary duplication of services and for services that were not "reasonably likely to benefit the debtor's estate" or "necessary to the administration of the case." Counsel for a Chapter 13 debtor is excepted from the requirement that its fees be "reasonably likely to benefit the debtor's estate" or "necessary to the administration of the case." *See* 11 U.S.C. §§ 330(a)(4)(A). Instead, counsel for a Chapter 13 debtor may receive compensation "for representing the interests of the debtor *in connection with* the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section." 11 U.S.C. § 330(a)(4)(B)(emphasis added).

9. Taken together, these sections of the Bankruptcy Code compel the conclusion that counsel for a Chapter 13 debtor is treated differently than counsel for a trustee or debtor-in-possession in a Chapter 7 or 11 case. However, the Court must still determine the difference between the phrase "in contemplation of" a bankruptcy case and the phrase "in connection with" such a case before it can allow fees to counsel for the Debtor here.

10. Other courts have construed the phrase "in contemplation of or in connection with the case" contained in section 329(a) and the phrase "in connection with the case" contained in section 330(a)(4)(B). For example, in *In re Mayeaux*, 269 B.R. 614, 622 (Bankr. E.D. Tex. 2001), the court held that "[a] fee payment is made 'in contemplation of' a bankruptcy case if the underlying professional services were rendered at a time when the debtor was contemplating bankruptcy. This subjective test is based upon the state of mind of the debtor. . . ." In contrast, "[i]f it can be objectively determined that the services rendered or to be rendered by the attorney have or will have an impact on the bankruptcy case, then such services are

deemed to have been rendered in connection with the bankruptcy case." *Id.* at 623. Similarly, in *In re Campbell*, 259 B.R. 615, 626 (Bankr. N.D. Ohio 2001), the court construed the phrase "in connection with" the case in section 329(a) and noted that "[t]he scope of the phrase 'in connection with the case' is broad" and "may include services related to the precipitating cause of the bankruptcy, or services which are inextricably intertwined with the bankruptcy," but it is "not so broad, however, that it includes every service rendered to a person who is a debtor." *See also Cohn v. U.S. Trustee (In re Ostas)*, 158 B.R. 312, 321 (N.D.N.Y. 1993) ("[t]he phrase 'in connection with' may include services related to precipitating cause of the bankruptcy, or services which are inextricably intertwined with the bankruptcy"); *In re Keller Fin. Serv. of Fla., Inc*., 248 B.R. 859, 879 (Bankr. M.D. Fla. 2000)(same).

11. After considering these prior court interpretations of the difference between fees incurred "in contemplation of" a case and those incurred "in connection with" such a case, and based upon the plain meaning of the words Congress chose, the Court concludes that fees are incurred "in contemplation of" a bankruptcy case when counsel is consulted by a client due to the client's financial problems and counsel discusses a possible bankruptcy filing as one of the alternatives for attempting to solve the client's financial difficulties. In contrast, the Court concludes that fees are incurred "in connection with" a bankruptcy case when the client has chosen bankruptcy as the means through which to resolve his financial difficulties and counsel thus begins to prepare for an actual filing under Chapter 13. Of course, fees incurred after the case is actually filed may also be incurred "in connection with" the case, although not all services provided to the debtor post-petition may meet this requirement as the court in *Campbell*, 259 B.R. at 626, correctly concluded.

12. Applying this interpretation of the different language found in sections 329 and 330 of

Bankruptcy Code here, the Court concludes that fees incurred prior to the Debtor's decision to file the Case are not allowable under section 330(a)(4)(B). From a review of the Fee Application, it appears that the decision to file the Case may have been made as early as June 22, 2001 but was made no later than June 29, 2001. Although the date the Debtor decided to file the Case is unclear on this record, the Court will give counsel for the Debtor the benefit of the doubt and will disallow, as an expense of administration, only those fees incurred prior to June 22, 2001. Although these fees appear to have been incurred "in contemplation of" the Case, the Court concludes that they were not incurred "in connection with" the Case. Thus, the Court disallows, as an administrative expense, the fees incurred by counsel for the Debtor from November 30, 2000 through December 8, 2000 (in the amount of $2,862.50) and on March 28, 2001 (in the amount of $105.00) for a total disallowance of $2,967.50.[2]

13. If reasonable in accordance with section 330(a)(3), fees and expenses incurred by counsel for the Debtor on and after June 22, 2001 are allowable as an administrative expense because they were incurred in connection with the Case. Counsel for the Debtor incurred $638.00 in fees on June 22, 2001 and June 29, 2001 and an additional $490.50 of fees on the Petition Date in preparing the petition and the creditor information necessary for such a filing. In reviewing these fees for reasonableness and for unnecessary duplication, it appears that 1.0

[2]The Court notes that counsel for the Debtor holds a prepetition retainer in the amount of $2,500.00. Under N.D. Tx L.B.R. 2016.1(b), counsel may withdraw up to $1,500.00 of the retainer from its trust account and apply those funds on its claim for attorney fees without Court order or a fee application. While N.D. Tx L.B.R. 2016.1(b) does not expressly contemplate applying those funds towards a prepetition claim for attorneys fees, the Court has no objection to counsel for the Debtor withdrawing up to $1,500.00 from its trust account and applying those funds on what the Court has found to be a prepetition claim for attorneys fees. However, if counsel wishes to withdraw in excess of $1,500.00 from its trust account and apply those funds on its prepetition claim, counsel must seek Court approval of the withdrawal in accordance with N.D. Tx L.B.R. 2016.1(b). In either event, counsel is encouraged to review the reasonableness of the fees it might seek to pay through a withdrawal from its retainer in light of the Court's findings as to the reasonableness of the other fees at issue in the Fee Application. This may avoid subsequent disputes with counsel in accordance with section 329(b).

hour of counsel's time on June 29 is a duplicate entry to a 1.1 hour entry of the same lawyer. Thus, the fee requested will be reduced by 1.0 hours or $175.00. Moreover, the fees incurred on the Petition Date appear excessive in that two attorneys and two paralegals were involved in preparing the minimal documents that were actually filed on the Petition Date.[3] Due to the duplication of effort that appears on the face of the Fee Application, the Court will reduce the fees requested by $200.00.

14. During the application period, counsel for the Debtor billed approximately 11.5 hours (at a total cost of $2,136.00) for inter-office conferences without any showing of the necessity for those conferences. As noted previously, no evidence was offered in support of the Fee Application. However, counsel for the Debtor did address the Court's concerns at the hearing and taking those statements as "evidence," the Court remains concerned that no reasonable justification for the interoffice conferences was provided. As it noted in its March 25 Letter, counsel for the Debtor are very experienced and specialize in "out of the ordinary" Chapter 13 cases. Given their experience, the absence of a reasonable justification for the interoffice conferences will result in an additional reduction of the fees sought in the Fee Application of $473.00.[4]

15. Counsel for the Debtor expended 6.8 hours of time at a cost of $1,452.50 in claims review. In some instances more than one attorney billed time with respect to either "review of proof of claim" or "review receipt of proof of claim." No reasonable justification was provided

[3]Only 4 pages of documents were filed on the Petition Date. As is typical, the Debtor's filing was deficient in several respects and the Debtor was served with a "Notice Requiring Missing Documents" on the Petition Date identifying the deficiencies and the date the noted documents were due. On July 16, 2001, the day before many of the documents were due, the Debtor filed his application for an extension of time to file his statement of financial affairs and schedules. The missing documents were in fact filed on August 2, 2001.

[4]Of the approximately $2,136.00 of interoffice conferences during the application period, approximately $1,190.00 were incurred prepetition and have been previously disallowed as an administrative expense. The balance of the interoffice conferences ($946.00) were reduced by 50%.

for the excessive time spent reviewing either form pleadings (such as notices of appearance) and what were apparently ordinary proofs of claim. While proofs of claim and notices of appearance must be reviewed so that creditors are dealt with in an appropriate manner in the Case and service of documents in the Case is proper, there is no reason why that process does not start with a paralegal or a junior attorney and, if something unusual becomes apparent, a more experienced professional can then become involved. An attorney billing at $175.00 to $250.00 per hour does not need to review every notice of appearance and every proof of claim filed in a Chapter 13 case. Because the time spent reviewing claims and form pleadings is excessive, the fees requested will be reduced by an additional $700.00.

16. To the extent necessary, a conclusion of law may be considered a finding of fact.

SUMMARY

Fees incurred prior to the time a decision had been made to file the Case in the amount of $2,967.50 are not allowable as an administrative claim. Moreover, the amount requested in the Fee Application will be reduced by an additional $1,548.00 for duplication of effort and unnecessary interoffice conferences between and among counsel's various professionals. Thus, counsel for the Debtor is allowed on an interim basis fees in the amount of $5,484.50 and expenses of $416.48 for a total interim award of $5,900.98.

The Court recognizes that certain of the fees it is disallowing in these findings of fact and conclusions of law may be part of the reason counsel took a voluntary fee reduction when it filed the Fee Application. However, the Court cannot determine the basis of the voluntary fee reduction from the record currently before it. Thus, if counsel believes that it can substantiate the reasonableness of, and necessity for, the fees disallowed on an interim basis in these findings of fact and conclusions of law and/or those fees it voluntarily reduced when filing the Fee Application, counsel may make such an evidentiary record in connection with its final fee application.

An Order consistent with these findings and conclusions will be entered separately.

SIGNED: August , 2002.

Barbara J. Houser
United States Bankruptcy Judge